Filed 8/2/02 P. v. Fisher CA6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GARLAND CARL FISHER,

Defendant and Appellant.

_____/

H022587

(Monterey County Superior Court No. SS980624)

In this appeal, defendant Garland Carl Fisher contends the trial court erred by denying defendant his federal constitutional right to self-representation during revocation of probation proceedings and during the subsequent sentencing hearing. For the reasons stated below, we shall affirm the judgment.

I. Procedural and Factual Background

In 1998, defendant pleaded no contest to felony drunk driving (Veh. Code, § 23152, subd. (a)), and the prosecutor moved to dismiss two counts of driving on a suspended license (Veh. Code, §§ 14601.2, subd. (a), 14601.5, subd. (a)). On August 4, 1998, defendant was placed on probation for five years.

At 1:23 a.m. on November 28, 2000, a Salinas police officer observed defendant driving a pickup truck. Defendant was speeding and drifting across the center divider. As he approached a red light, he slowed almost to a stop several

hundred yards from the intersection. After the light turned green, defendant slowly pulled forward and drove until abruptly stopping in a left-turn lane. At that point, the officer pulled defendant's truck over. The officer smelled the odor of alcohol and noticed that defendant appeared sleepy and had watery, bloodshot eyes as well as slurred speech. After conducting field sobriety tests, the officer determined defendant was driving under the influence of alcohol. Although defendant was informed he was required to submit to a chemical test as a condition of his probation, defendant refused to take such a test.

The probation office charged defendant with violating his probation by driving under the influence of alcohol, driving on a suspended license, and refusing to take a chemical test. After a formal hearing, the trial court revoked defendant's probation and sentenced him to two years in state prison.

II. Discussion

Defendant contends the trial court erred by denying his three requests to represent himself during the probation revocation proceedings and the ensuing sentencing hearing. After setting forth the general law of self-representation and the appropriate standards of review, we shall consider each of defendant's claims.

A. The Law and Standards of Review in the Area of Self-Representation

A criminal defendant has a constitutional right of self-representation. (U.S. Const., 6th Amend.; *Faretta v. California* (1975) 422 U.S. 806, 818-836 (*Faretta*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) When a defendant knowingly and unequivocally makes a *Faretta* motion within a reasonable time before the commencement of trial, the court must grant the request. (*People v. Welch* (1999) 20 Cal.4th 701, 729; *People v. Horton* (1995) 11 Cal.4th 1068, 1107.) Before a defendant can be permitted to represent himself, the trial court must determine that his choice is knowing, intelligent, and unequivocal. While there is no formula for determining whether a choice is knowing and intelligent, the court must assure that defendant is

aware of the dangers and disadvantages of self-representation. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1012; *Faretta*, *supra*, 422 U.S at pp. 834-835 [trial court must be certain defendant "knows what he is doing and his choice is made with eyes open" and that he makes his choice of self representation "competently and intelligently"].) On appeal, we are not required to find an unequivocal invocation "simply because the trial court described the motion as one for self-representation, or because the trial court failed to make an express finding on the record that the request was equivocal, insincere, or made for the purpose of delay." (*People v. Marshall* (1997) 15 Cal.4th 1, 25 (*Marshall*).) In *Marshall*, the court declined to determine whether a de novo review or substantial evidence review applies, finding that the defendant's claim in that case failed under either standard. However, the court noted that in cases from other jurisdictions, de novo review of the record is common. (*Id*. at pp. 24-25.)

The denial of a timely motion for self-representation motion in violation of *Faretta* requires per se reversal. (*People v. Joseph* (1983) 34 Cal.3d 936, 948.) However, a *Faretta* motion made after this period is addressed to the sound discretion of the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

B. Initial Self-Representation Request Prior to Probation Revocation Hearing

On Wednesday, December 6, 2000, defense counsel informed Judge Wendy C. Duffy that defendant wanted to represent himself. Judge Duffy decided to put the case over to Friday of that week. She told defendant that the court would give him a *Faretta* "waiver form" that he would need to fill out "in order for the Court to consider [his] request to represent [himself]." When asked if he "under[stood] that," defendant replied, "Yes, I'll read this and fill it out." Asked if he was "asking the Court to allow you to represent yourself," defendant responded, "Yeah. I want to take care of myself." The court then told defendant that it would put his case "over two days for you to review and consider that form."

After the matter was continued several times, defense counsel next raised the issue of defendant representing himself on December 27, 2000. Judge Robert O'Farrell presided over the proceedings on that date. When Judge O'Farrell first began speaking with defendant regarding his potential desire to represent himself, defendant said he could not hear what the court was saying because "I don't understand the manner of your speech." After a brief recess at the request of the prosecutor, who asked if the attorneys could approach the bench to bring the court "up to speed on this," the judge recalled the case and, referring to the *Faretta* waiver form, told defendant that the form "explains all of the possible pitfalls in representing yourself, and I would ask you to, if you want to represent yourself, I would ask you to read it and then initial that you understand these things and that you agree to go ahead as your own attorney." When asked if he was "willing" to read the form and initial that he understood it, defendant said, "I will remain in my own sovereignty." When the court asked, "That's a no, I take it?," defendant repeated, "I will remain in my own sovereignty." The judge then said, "I will not grant your request to represent yourself *at this time*." (Emphasis added.)

Citing *People v. Silfa* (2001) 88 Cal.App.4th 1311, defendant contends there is no requirement that a defendant complete a waiver form in order to exercise his right to self-representation. The case does not so hold.

In *Silfa*, defendant filled out a *Faretta* form, which the court went over in detail with defendant. After a lengthy exchange, the court found the defendant did not understand the consequences of his contemplated act and denied his request to represent himself. (*Id*. at pp. 1315-1321.) The appellate court found that the trial court improperly used the *Faretta* form to test the defendant's competency to act as his own lawyer, noting that such forms only should be used as a means by which to impress upon a defendant the dangers of self-representation so that his waiver would be knowing and intelligent. The *Silfa* opinion acknowledges the *Faretta* form's utility

as "a means by which the judge and the defendant seeking self-representation may have a meaningful dialogue concerning the dangers and responsibilities of self-representation" and acknowledged that "[t]he advisements in the form also serve to warn the defendant of the complexities of the task about to be undertaken." (*Id*. at p. 1322.)

We reject defendant's claim that the judge should have gone over the contents of the form verbally with defendant or explained the risks of representation to him verbally since "[i]n no manner did [defendant] indicate that he wouldn't listen to the court on this subject." Here, where defendant moments earlier had said he could not understand the manner of the judge's speech, the court properly asked defendant to read the *Faretta* form as a means by which to impress upon a defendant the dangers of self-representation so that his waiver would be knowing and intelligent. (*People v. Silfa*, *supra*, 88 Cal.App.4th at p. 1322.)

Defendant recognizes that he must unequivocally assert his constitutional right of self-representation, and he claims there was no "equivocation in his assertion of his desire to represent himself." When defendant first was informed that he needed to read and initial a *Faretta* form, he acknowledged his understanding of this requirement and assured the court he would read the form "and fill it out." Defendant's sudden refusal to even read the *Faretta* form, which was contradictory to his earlier response, his failure to engage the court in meaningful dialogue regarding the issue of self-representation, and his apparently non-responsive reply to the court's question whether his comment "I will remain in my own sovereignty" was a "no" to the court's request that he read about the pitfalls of self-representation and initial his understanding of those pitfalls, created an ambiguity as to defendant's desire to actually invoke his right to self-representation. Defendant's words and conduct also created doubt whether defendant understood the risks of representing himself and whether any waiver of the

right to self-representation by defendant would be knowing and intelligent.[1] (See *Marshall, supra,* 15 Cal.4th at p. 23 [courts should evaluate whether defendant has stated motion clearly when faced with motion for self-representation].) Accordingly, we are convinced the trial court did not err by denying defendant's December 27 equivocal request to represent himself.[2]

C. Second Self-Representation Request Prior to Revocation Hearing

At the beginning of the revocation hearing on December 29, 2000, the following exchange took place between defendant and Judge Robert F. Moody, the judge who presided over the revocation proceedings and the subsequent sentencing hearing: "THE COURT: Garland Fisher is next. [¶] THE DEFENDANT: My attorney is not my counsel. [¶] THE COURT: Have you hired counsel? [¶] THE DEFENDANT: No. I stand to speak for myself-- [¶] THE COURT: Have you-- [¶]

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[1] Counsel for defendant on appeal provides us with a Webster's Dictionary definition of "sovereignty" which includes "'[t]he quality of state of being sovereign, or of being a sovereign; the exercise of, or right to exercise, supreme power; dominion; sway; supremacy; independence.'" He then argues that, in defendant's case, the "'sovereignty' *would appear* to refer to the 'right to exercise . . . independence.'" (Emphasis added.) The fact defendant's appellate counsel remains uncertain what defendant meant by his cryptic response to the court during their dialogue on the issue of self-representation supports this court's determination that defendant's comments to the court on December 27 were ambiguous and thus constituted an equivocal request to represent himself.

[2] In his reply brief, defendant contends the People are barred from arguing that defendant's "refusal to read and sign the *Faretta* waiver form was a legitimate basis for denying the *Faretta* motion." He bases this contention upon the fact that, when defendant said there "was no law that says I have to sign something to stand for myself and speak for myself" on December 29, 2000, the deputy district attorney in court on that date commented, "That's probably true." We are not persuaded by this argument since it is not the refusal to sign the *Faretta* form by itself which constituted an equivocal request, but defendant's shifting positions regarding the *Faretta* form, his unwillingness to read about the pitfalls of representation and to acknowledge his understanding of those pitfalls, and his unorthodox response to the court's questions regarding his request to represent himself.

-- as a sovereign party. [¶] THE COURT: Have you signed a Ferretta [*sic*] waiver? [¶] THE DEFENDANT: There is no law that says I have to sign something to stand for myself and speak for myself. [¶] [MR. KAUFMAN [the prosecutor]: That's probably true. [¶] THE COURT: That is true. But there is the discretion of the Court as to whether to permit you to represent yourself when you refuse to acknowledge the foolishness of doing that and you haven't done that, and so counsel stays with you. [¶] THE DEFENDANT: "Well, I have here a filed claim. This is in the truth, of the truth, and for the truth. And they have joined me by my flag on the *[sic]* December 27, 2000--"

Assuming arguendo defendant did make an unequivocal request for self-representation on December 29, we conclude the trial court did not err in denying that request. Defendant had refused to read over the *Faretta* form to learn about the risks of self-representation. The trial court was entitled to conclude that, because defendant would not read about and acknowledge the risks of self-representation, he could not knowingly or intelligently waive his right to counsel. (*Faretta*, *supra*, 422 U.S. at p. 835.)

D. Self-Representation Request Prior to Sentencing

Defense counsel filed a motion entitled "Motion to Proceed in Pro Per" prior to the sentencing hearing. It was not signed by defendant. Prior to the sentencing hearing, defense counsel Glenn Nolte brought up the *Faretta* issue, telling Judge Moody, "Mr. Fisher didn't want me here. He's made that perfectly clear. I think I set it out in my P's and A's here." At that point, defendant interjected, "Mr. Nolte, I still haven't given you any authority to speak on my behalf. You filed a motion that has no autograph on --" Judge Moody then asked defendant whether he wanted to relieve counsel or change counsel. Defendant replied, "For the peremptory challenge, courtroom is unjust."

The court responded as follows: "The problem, Mr. Nolte, is that Mr. Fisher is intentionally obstructive and the cases are quite clear where that's the situation it's proper to appoint counsel to represent him even though he may not like the idea. I have looked over the materials that he's filed. I'm familiar with the attitude that he has taken throughout these proceedings. It is that the Court has no jurisdiction over him, that he is dedicated to being obstructive to the lawful process of the State of California at every turn, and he files gibberish, dilatory, obstructive gibberish and under those circumstances it simply is not prudent or possible to proceed with him as his own counsel."

After noting that "this Court is very protective of people's rights to represent themself *[sic]*," the court continued with its analysis of the situation before it: "[W]e have reviewed Mr. Fisher to see whether he is [Penal Code section] 1368 or not, and he's been determined not to be. That[] settles that issue. And I'm not saying that he is incompetent to be his own counsel and that that should be the reason why the public defender should remain in the case. He has a right to represent himself. The only problem is that in so doing he needs to be willing to follow acceptable court procedure and to behave himself in a manner that is at the very least consistent with a rational proceeding and he has to at the very least proceed as though the court process is lawful, and he refuses to do that. He refuses to meaningfully participate. He intends to be disruptive, and he has been, and we cannot proceed. We cannot do his case in that way. So if he had been willing to conduct himself and comport himself in a manner that we can understand what he means, what he wants, then we could go ahead no problem. But there's just simply no way to conduct a meaningful proceeding with him having the attitude that he does and behaving himself in the way that he does. It's impossible and I understand your difficulty. He didn't want you. He won't cooperate with you, but somebody who is connected to the rational court process needs to stand up for him."

Judge Moody then announced that he "specifically finds that Mr. Fisher is intentionally obstructive." Noting that defendant "wants to impose his own law, his own procedure, his own court, his own jurisdiction," the judge concluded, "I don't see that it's possible to proceed that way. That just leads to a chaotic and unnecessarily antagonistic situation where we can't proceed. Other than simply removing Mr. Fisher from the courtroom and steam rolling him, we can't proceed and that isn't right either. So this is a carefully, calculated scheme on his part and he does this on purpose and just for the purpose of creating the kind of difficulties that we're facing and then he will, whichever way any court goes, he will come back on appeal and attempt to make something out of it. But the Court finds that based upon his attitude and his refusal to participate in the processes of the California courts that self-representation is a right that he has waived and bypassed."

Prior to the sentencing hearing, when defense counsel referred to his having filed a motion for defendant to represent himself, defendant immediately clarified that he did not ask or authorize defense counsel to file a motion for pro per status. Defendant then refused to answer the court's questions regarding whether he was making a motion to relieve or change counsel. Defendant's words and conduct prior to the sentencing hearing created ambiguity whether he unequivocally and intelligently sought to represent himself at that hearing.

In any event, we conclude the trial court did not abuse its discretion in finding that defendant could not represent himself in this case because he was "intentionally obstructive" because he was unwilling to abide by court procedures and by courtroom protocol.

"'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' [Citation.] The high court reiterated this point in *McKaskle, supra,* 465 U.S. 168, noting 'an accused has a Sixth Amendment right to conduct his own

defense, provided only that he knowingly and intelligently forgoes his right to counsel *and that he is able and willing to abide by rules of procedure and courtroom protocol*.' [Citation.] This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a sanction against disruption, would have the capacity to bring his trial to a standstill." (*People v. Welch*, *supra*, 20 Cal.4th at p. 734, emphasis in *Welch* opinion.)

Here, the trial judge, who had observed defendant throughout the revocation hearing proceedings, determined that defendant would "remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his . . . actions or words so as to preclude the exercise of the right to self-representation." (*People v. Welch*, *supra*, 20 Cal.4th at p. 735.) Its decision to deny defendant's motion for self-representation based upon disruptive behavior is subject to great deference on appeal. In so concluding, the *Welch* court noted its awareness that "the extent of a defendant's disruptive behavior may not be fully evident from the cold record, and that one reason for according deference to the trial court is that it is in the best position to judge defendant's demeanor." (*Ibid*.)

In this case, at the beginning of the revocation hearing, defendant told Judge Moody that "this is all in fraud and fiction." Defendant then was asked to "have a seat" three times before the court suggested that defendant could "stand if you'd like." When the first witness, Salinas Police Officer Cornelison, was sworn to testify, defendant interrupted and said, "I do." When the witness was asked to state his name, defendant again interjected, "I object to the oath because the oath is also in fraud." When the objection was "[n]oted," defendant said, "I can prove it on the chalkboard." Approximately a month later, defendant refused to answer Judge Moody's questions whether he wanted to represent himself and, instead, stated that "[f]or the peremptory challenge, courtroom is unjust." We find no abuse of the trial court's discretion to

deny self-representation due to obstructionist behavior. Defendant's behavior during the revocation hearing and before the sentencing hearing, as well as his history of not answering the court's questions, claiming not to understand what the court was saying, challenging the legitimacy of the proceedings against him, and suggesting the court had no jurisdiction over him because he was his own "sovereignty," provided ample basis for the court's determination. Here, as in *Welch*, "while no single one of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive." (*People v. Welch*, *supra*, 20 Cal.4th at p. 735.)

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Rushing, J.